IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11166
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN JACKSON,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:93-CV-2424-G
(3:88-CR223-G)
- - - - - - - - - - -
(April 13, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:*

A movant for in forma pauperis (IFP) status on appeal must show that the movant is a pauper and that he will present a non-frivolous issue on appeal. Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982).

Jackson argues that he was denied a fair trial when the Government committed prosecutorial misconduct by improperly expressing his personal belief as to the veracity of a witness.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Relief under § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries in federal criminal cases that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Even when a petitioner alleges a fundamental constitutional error in a § 2255 petition, he generally may not raise the issue for the first time on collateral review without showing both cause for his procedural default and actual prejudice resulting from the error. United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc).

However, the procedural bar is invoked only when it is raised by the Government in the district court. United States v. Drobny, 955 F.2d 990, 994-95 (5th Cir. 1992). Because the Government was instructed by the district court not to answer, and therefore, was not given an opportunity to raise procedural bar, this court will consider the merits of Jackson's claims. See United States v. Bertram, No. 92-1428, 2-3 (5th Cir. March 1, 1993) (unpublished).

When a prosecutorial statement does not implicate a specific constitutional right that has been incorporated in to the Fourteenth Amendment by the due process clause, the comment is sometimes called a "generic substantive due process" violation. Rogers v. Lynaugh, 848 F.2d 606,608 (5th Cir. 1988) (internal quotations and citations omitted); see United States v. Flores, 981 F.2d 231, 235 (5th Cir. 1993) (recognizing that a § 2255 petition is designed to provide a substantially equivalent remedy

for individuals in the custody of the federal government as that available under a 28 U.S.C. § 2254 habeas petition). To be such a violation, the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. (internal citations and quotations omitted). For a trial to have been fundamentally unfair, there must have been "a reasonable probability that the verdict might have been different had the trial been properly conducted." Id. (internal citations and quotations omitted).

During closing, the Government commented to the jury about the testimony of Jackson's coconspirators. Counsel stated that:

> [y]ou should look at [the coconspirators' testimony] very closely. They entered into a plea bargain agreement with the government. True. to do what? To testify truthfully. Their testimony has the ring of truth to it, doesn't it? It's consistent with each other and with what Juan Jackson says. Juan Jackson says he was coerced or forced to it, but his testimony is consistent with the others. Look at the testimony carefully, and I think you will see that you can believe them beyond a reasonable doubt, that they have testified truthfully and in return for a benefit. That shouldn't come as any surprise.
>
> It's got the ring of truth to it folks. You've heard from insiders to this crime . . . . Cook, Cummings, Merrill, the others. They are telling you the truth, folks.

Jackson's counsel did not object to these remarks.

It is impermissible for the prosecutor to assert his own personal opinion regarding the credibility of a witness as a basis for conviction. United States v. Herrera, 531 F.2d 788, 790 (5th Cir. 1976). However, while counsel asserted that

Jackson's coconspirators were telling the truth, he did not give the jury his personal guarantee that Jackson's coconspirators were telling the truth or expressly state that it was his personal opinion, thereby advancing his credibility to support the veracity of the coconspirators' testimony. Instead, the comments, taken in context, appear to be proper comments on the evidence that was before the jury. As such, the comments did not make the trial so unfair that Jackson's conviction was a denial of due process or that Jackson would have received a different verdict if the comments had not occurred.

To demonstrate ineffective assistance of counsel, Jackson must prove his counsel's ineffectiveness by demonstrating that counsel's performance was both deficient and prejudicial to him. See Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish prejudice, Jackson must show that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). Such unfairness or unreliability results only if counsel's ineffectiveness deprives a defendant of a substantive or procedural right to which the law entitles him. Id.

Because Jackson cannot demonstrate the comments were improper, Jackson cannot demonstrate that he was prejudiced by counsel's failure to object to the comments.

Jackson argues that he was denied a fair trial when evidence of other crimes was presented to the jury. He also contends that, because the evidence was erroneously admitted, the prosecutor improperly commented on it during closing argument,

thereby inciting and prejudicing the jury against him. Finally, he contends that his attorney was ineffective for failing to object to the admission of the evidence and the Government's reference to it.

Admission of evidence of extraneous offenses may constitute a constitutional violation if they result in a denial of a fundamentally fair trial under the due process clause. See Porter v. Estelle, 709 F.2d 944, 957 (5th Cir. 1983) (§ 2254 case). Even the erroneous admission of prejudicial evidence justifies relief under habeas relief only if it is "material in the sense of a crucial, critical highly significant factor." Id. (internal quotations and citations omitted). As a constitutional claim, Jackson's contention is within the ambit of § 2255. See United States v. Shaid, 916 F.2d 984, 987 (5th Cir. 1990).

At trial, the Government introduced evidence of a prior kidnapping incident in Wichita, Kansas, involving Jackson and Camacho. The victim of the kidnapping Janice Wilson, testified and positively identified Jackson as one of the kidnappers. Wilson testified that they took her to Dallas as security for a debt owed to Camacho by Wilson's brother-in-law and released her upon payment of the money.

Before the admission of the evidence, counsel objected to the admission of the evidence as being more prejudicial than probative. The district court found that the evidence was relevant to show Jackson's intent to commit the crime for which he was being tried and that any prejudice carried by the evidence was outweighed by its probative value. During closing argument,

the prosecutor referred to the evidence and reminded the jury that they could use it to determine intent on the part of Jackson to commit the kidnapping for which he was being tried.

Extraneous offenses may be admitted into evidence without violating the Due Process Clause if there is a strong showing that the defendant committed the offense and that the extraneous offense is rationally connected to the offense charged. Story v. Collins, 920 F.2d 1247, 1254 (5th Cir. 1991) (§ 2254 case).

As demonstrated above, there was a strong showing that Jackson committed the kidnapping in Kansas. Further, the kidnapping offense that occurred in Kansas was rationally connected to the offense because it demonstrated Jackson's intent to kidnap Evellyn and Andre Banks. The evidence at trial demonstrated that Camacho and Jackson kidnapped Evellyn and Andre Banks and took them to Dallas as security for payment of a debt that Evellyn's boyfriend owed to Camacho. United States v. Jackson, 978 F.2d 903, 906-07 (1992). Even if the evidence was prejudicial, it was material in the sense of a crucial, critical highly significant factor in the trial. Jackson was not denied a fundamentally fair trial by the admission of the evidence.

Because there was no error in admitting the evidence, the prosecutor was not improper in referring to it in his closing argument to the jury. Additionally, because the record demonstrates that Jackson's counsel did object to the admission of the evidence, Jackson cannot demonstrate deficient performance on the part of his counsel. See Strickland, 466 U.S. at 687.

Jackson argues that the jury reached an inconsistent verdict in finding him guilty of kidnapping after finding him not guilty of conspiracy to kidnap. He contends that the jury found him guilty of kidnapping based on a theory of aiding and abetting, and that this result is inconsistent with the jury's acquittal of the conspiracy offense. He argues that there was never any evidence to demonstrate that he knew or could have reasonably foreseen that the victims would be transported across state lines.

Although Jackson expresses his argument as one of inconsistent verdicts, he is effectively challenging the sufficiency of the evidence of his convictions. See United States v. Pena, 949 F.2d 751, 755 (5th Cir. 1991) (interpreting contention that not "guilty verdict" for conspiracy and "guilty" verdict for aiding and abetting were a challenge to the sufficiency of the evidence);

Jackson raised his sufficiency-of-the-evidence issue on direct appeal. Jackson, 978 F.2d at 909-11. This court will not reexamine issues in a § 2255 motion that have been previously disposed of on direct appeal. See United States v. Kalish, 780 F.2d 506, 508 (5th Cir.)("[I]ssues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 Motions."), cert. denied, 476 U.S. 1118 1986).

However, this court considers Jackson's allegations to the extent that he raises an independent argument regarding the allegedly irreconcilable jury verdict. The indictment charged

Jackson with conspiracy to kidnap Evellyn and Andre Banks and two separate counts of kidnapping. The jury found Jackson guilty of the kidnapping charges and not guilty of the conspiracy charge.

In a multiple-count indictment, "even if the counts were overlapping, the law does not require consistency of verdict between the separate counts. Inconsistent verdicts may simply be a reflection of the jury's leniency." Pena, 949 F.2d at 755 (citations omitted). Because the jury was free to find Jackson guilty of the independent kidnapping charges without rendering a guilty verdict on the conspiracy charge, Jackson's argument collapses.

Finally, Jackson argues that the district court should have granted him an evidentiary hearing on his above-mentioned ineffective-assistance-of- counsel claims.

If the record is adequate to evaluate the claims in a § 2255 motion fairly, the district court need not hold an evidentiary hearing. See United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990). Because such is the case here, the district court did not err by refusing to convene an evidentiary hearing.

IFP DENIED. APPEAL DISMISSED.